United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 9, 2010

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT : Lockheed Martin Corp.
Case 04-CA-36987 548-6030-3335

and

Association of Scientists and Professional Engineering Personnel
Case 04-CB-10377

These cases raise the issue of whether a union and employer violate Section 8(b)(1)(A) and (2) and 8(a)(3) respectively by maintaining a memorandum of agreement guaranteeing union representatives that for the duration of their service to the union and for one rating period beyond, they will receive at least the same performance rating that they achieved prior to their union service.

We conclude that the charges should be dismissed, absent withdrawal. Under the principles of WPIX[1], the union and employer did not violate Section 8(b)(1)(A) and (2) and 8(a)(3) respectively because the agreement at issue does not encourage union status or activity.

FACTS

The Association of Scientists and Professional Engineering Personnel ("the Association") represents a bargaining unit of engineers and scientists employed at Lockheed Martin ("the Employer") at its Moorestown, New Jersey facility and four satellite facilities. The Association also represents employees at another employer, L-3 Communications, which is a spin-off of an earlier incarnation of Lockheed Martin. The Association's elected governing body, its 10-member Executive Board, is composed of representatives from both Lockheed Martin and L-3

[1] Electrical Workers IBEW Local 1212 (WPIX), 288 NLRB 374, 376 (1988), rev. denied 870 F.2d 858 (2d Cir. 1989).

Communications.

Unit employees are subject to an Engineering Performance Review ("EPR") Plan, an annual evaluation that affects the amount of salary increase each employee will receive the following year. The EPR includes several steps. First, each employee sets personal performance goals and objectives subject to managerial approval. Then, the employee evaluates his or her own performance throughout the evaluation year based on those goals and objectives, and at the end of the year, the employee conducts a self-assessment. Next, the employee's manager assesses the degree to which the employee met his or her goals and objectives and evaluates the employee. Based on the manager's assessment of the employee's performance, the manager numerically ranks the employee relative to his or her peers in descending order of merit.

Based on their rankings, the Employer next divides the employees into the following rating groups: "one," an Exceptional Contributor; "two," a High Contributor; "three," a Successful Contributor; "four," a Basic Contributor; and "five," Unsatisfactory. Although there are no restrictions on the number of employees in each rating group, the Employer generally seeks to have the top 10-15% of ranked employees rated "one;" the next 20-25%, "two;" the next 50-55%, "three;"[2] the next 5-8%, "four;" and a handful of the lowest-ranked employees rated "five." Pay increases are distributed from a negotiated "merit pool" percentage (around 4-5%), with the "threes" generally receiving roughly the amount of the pool percentage for the year, the "twos" and "ones" receiving more than the pool percentage, the "fours" getting about a half percent increase, and the fives getting no increase.

Since the 1970s, the Employer and Association have maintained a Memorandum of Agreement (MOA) stating:

> For the duration of their services on the Association Executive Board and for one merit review period immediately following cessation of such Board service, employees elected to the Association Executive Board shall maintain a rating no less than the EPR rating received for the merit review period immediately prior

[2] This category may be further divided into "Top 5%," "Middle," and "Low" subgroups.

> to their election. However, this does not preclude them being given a higher EPR rating during this period of service on the Board. EPR ratings subsequent to the merit review period immediately following the cessation of Board service will be determined by the employee's future performance.

Under the MOA, all 10 members of the Executive Board are guaranteed to maintain the EPR rating they had in the evaluation period directly preceding their Board service for the duration of their service and one evaluation period beyond. However, there is no displacement effect from the MOA. To illustrate, for the 2008 merit review period, two employees who were members of the Executive Board were ranked 124 and 238, respectively. This placed them both in a worse rating group than the High Contributor group each had been in prior to being elected to the Executive Board.[3] Without the MOA, the employees would have received lesser raises because in order to be in the High Contributor group during the 2008 merit review period, an employee needed to be ranked no lower than 101. As a result of the MOA, these two Executive Board members were moved to rankings 102 and 103, and the bottom of the High Contributor group was extended to 103. The Executive Board members did not "bump" any employees from the High Contributor group. Rather, they were simply added to the bottom of that group. As a result of the change in rating they both received a higher percentage increase than they would have without the MOA. But, since no employees were displaced from the High Contributor or any other rating group, employees who were not Executive Board members suffered no monetary harm from the MOA's application.

The MOA was negotiated after an Executive Board member serving as a grievance chairperson, having spent considerable time working on a grievance related to widespread layoffs, received what the Association viewed as a punitive performance rating. The Association pursued the grievance to arbitration, and the arbitrator reinstated the grievance chair's EPR rating to its prior level. Subsequently, the parties negotiated the language contained in the MOA and have included it in every successor collective-bargaining agreement to date. In addition, under the current collective-bargaining agreement, an

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[3] The lower the numeral, the better the rating.

arbitrator may not change an employee's EPR rating, even if the arbitrator determines that a rating is incorrect, but may only direct the Employer to reconsider the review and rating.

ACTION

We conclude that the Association and Employer did not unlawfully discriminate against unit employees by negotiating an MOA guaranteeing Executive Board members that they will receive at least the same EPR rating that they earned prior to their service to the Association.

Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause" an employer to discriminate in violation of Section 8(a)(3). Section 8(a)(3), in turn, prohibits discrimination based on the exercise of employee rights that has the tendency to encourage or discourage union membership. The purpose of those provisions is to allow employees to freely exercise their right to join a union, or abstain from joining a union, without imperiling their livelihood.[4]

Pursuant to the above principles, if contractual provisions treat employees differently based on union activity and such provisions encourage union activity, they are lawful only if they are justified by the policies of the Act.[5] Nevertheless, the Board has held that provisions that treat employees differently based on union activity, in order to remove conditions of employment that tend to discourage employees from engaging in such activity, are lawful so long as those provisions do not unduly encourage union activity by disadvantaging employees who choose to

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[4] Radio Officers' Union of Commercial Telegraphers Union v. NLRB, 340 U.S. 17, 40 (1954). See also Dairylea, 219 NLRB 656, 658 (1975), enfd. sub nom., 531 F.2d 1162 (2nd Cir. 1976) (policy of the Act is to insulate job rights and benefits from union activities).

[5] See e.g. Dairylea 219 NLRB at 657-8 (contract provision granting stewards superseniority for all purposes unlawful because it encouraged union activity without improving steward's effectiveness).

refrain from union activity.[6]

The Board applies a three-part test for analyzing whether contract provisions that make some distinction among employees on the basis of union activity or status unlawfully encourage or discourage union membership.[7] First, does the provision treat employees differently on the basis of their union status or activity?[8] Second, does the distinction tend to encourage the union status or activity in question? If the answer to both is yes, the analysis proceeds to step three: is the disparate treatment at issue justified by policies of the Act?[9] If, however, the answer to either of the first two questions is no, there is no need to reach the third step because there is no violation, and the case should be dismissed.[10] Thus,

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[6] See WPIX, 288 NLRB 374 (1988); Consumers Energy Co., 325 NLRB 963 (1998).

[7] WPIX, 288 NLRB at 376.

[8] See Id. (since clause at issue did treat employees differently on the basis of union-related considerations, Board next considered whether it tended to encourage the union activity in question).

[9] See Manitowoc Engineering Co., 291 NLRB 915, 919 (1988) (having found that the contract provision differentiates among individuals on the basis of fulfillment of a union obligation, and that the differentiation encourages individuals to fulfill that obligation, we must determine whether that disparate treatment is justified by the policies of the Act. See also WPIX, 288 NLRB at 377 (Board, explaining how the WPIX test was consistent with the Dairlyea line of cases, noted that there, unlike in WPIX, the superseniority clauses at issue "clearly encourage[d] employees to become union officers because they gained seniority they could not have possessed had they not done so." Thus, such clauses would be "lawful only if justified in terms of the collective-bargaining policies of the Act. . . . we see no need to reach the 'justification' inquiry in the present case.")

[10] Id. See also Consumers Energy Co., 325 NLRB 963, 965 (1998).

only if the distinction tends to encourage union status or activity does the Board require that it be justified by the policies of the Act.[11]

Factors the Board considers in analyzing the second step, i.e. whether a contract provision encourages union activity, include whether the contract language placed unit employees at a disadvantage vis-à-vis their union official counterparts;[12] whether the contract language placed union

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[11] Disparate treatment is deemed to be justified by the policies of the Act if it furthers the effective administration of bargaining agreements or redounds in its effects to the benefit of unit employees. See Manitowoc Engineering Co., 291 NLRB at 919 (in analyzing third step, the disparate treatment was not justified by the policies of the Act: the provision that an individual may retain his accrued seniority while working as foreman by obtaining a withdrawal card or by continuing to pay union dues is in no sense intended to, nor does it, further the effective administration of bargaining agreements). See also Dairylea, 219 NLRB at 658 (clause giving union stewards preference in securing a range of on-the-job-benefits was unlawful because, unlike superseniority limited to layoff and recall, it served no purpose to the bargaining unit by encouraging the continued presence of the steward on the job).

[12] See WPIX, 288 NLRB at 376 (leave of absence provision for union office did not encourage union activity; "an employee who stays at his job...is no worse off with respect to seniority than an employee who takes a leave of absence to work for the Union"); Consumers Energy Co., 325 NLRB at 965 ("employees who do not take full-time union office, but remain on the job with the [] Employer, are not disadvantaged due to the pension plan amendment. They remain in the same situation, and will receive the same retirement benefits, as before."); Stage Employees IATSE Local 695, 261 NLRB 590 (1982) (contractual entitlement to be restored to former unit position not a preference or advantage, but merely a restoration leaving the employee in no better position than if they had never left the unit position in the first instance).

activists in a preferred position unattainable by unit employees who did not choose to become union activists;[13] whether the contract language at issue removed a condition that discouraged employees from union service;[14] and any specific evidence showing that the contract language has or has not had the effect of encouraging union activity.[15]

In WPIX, for example, the Board found lawful a contract provision allowing employees to take a two-year unpaid leave of absence to serve as full-time paid union officers, even though leave granted for other reasons was limited to a six-month duration and employees were prohibited from seeking outside employment. In both situations, the employees lost no seniority for layoff purposes while they were on leave. At step one, the Board

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[13] Cf. Dairylea, 288 NLRB at 377 (clause clearly encouraged employees to become union officers because they gained seniority they could not have possessed had they not done so); R. L. Lipton Distributing Co., 311 NLRB 538 (1993)(a contract provision that union stewards receive 45 cents per hour in addition to their regular rate of pay encouraged union activity because it provided a benefit available exclusively to union stewards). Compare WPIX, 288 NLRB at 377 (clause at issue provided employees returning from a union-related leave of absence with a restoration of their job in no better position than if they had never left, rather than a preference or benefit).

[14] See WPIX, 288 NLRB at 377-78 ("faced with the prospect of *losing* [] seniority...[an employee] might well be discouraged from taking leave to engage in...union activity"); Consumers Energy Co., 325 NLRB 963 (1998)(pension plan amendment lawful because it removed a condition that would discourage employees from taking union jobs, i.e. the potential retirement losses suffered by full-time officers because they were not eligible to participate in the company's 401(k) plan).

[15] WPIX, 288 NLRB at 377, n. 13 ("any possibility of the business representative position leading to further union jobs is too speculative, and in the case before us, the union activist did not embark on a career with the union but sought to return to his position at WPIX").

found that the contract provision at issue treated employees differently on the basis of union-related considerations because the period of no lost seniority was longer for those on union-related leave. However, at step two, the Board found that the provision did not encourage union activity or status. The Board reasoned that unit employees who remained on the job were not disadvantaged with respect to seniority in relationship to employees who elected to take leave to work for the union, and that full-time union officers were not placed in a privileged position unattainable by other unit employees.[16] Instead, the contract provision removed a condition that would have discouraged employees from taking temporary union jobs. Because the contract provision at issue did not encourage union activity, the Board concluded that there was no need to reach the third step of the analysis.

Similarly, in Consumers Energy Co.,[17] the Board found lawful a contractual grant of an increased pension credit to employees on leave of absence to hold union office. At step one, the pension plan amendments did treat employees differently on the basis of union status or activity. However, at step two, the disparate treatment did not encourage employees to become active unionists. Prior to the pension plan amendment, union officers — who neither received pension credits nor participated in the company's 401(k) plan while on leave — risked disadvantage at retirement. Even after the pension plan amendment went into effect, full-time union officers "were not necessarily placed in a better position with respect to retirement benefits than the remainder of the bargaining unit."[18] Thus, the Board found that the amendment "remove[d], in part, a condition that would discourage employees from taking [union] jobs."[19] Since the contract language at

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[16] WPIX, 288 NLRB at 376 ("It is unreasonable to suppose that an employee would take an outside-the-plant union job simply to retain the seniority that he would possess even if he did not take such job.").

[17] 325 NLRB 963 (1975).

[18] Id.

[19] Consumers Energy Co., 219 NLRB at 965.

issue did not encourage employees to be union activists, it was not necessary to reach the third step of the analysis.

Applying the Board's three-part test to the facts here, we conclude that neither the Association nor the Employer violated the Act by negotiating the MOA. Regarding the first step, the MOA does treat employees differently on the basis of union status or activity because Executive Board members alone are guaranteed the same EPR rating they earned prior to Association service. However, regarding step two, here, as in WPIX, the distinction does not encourage employees to engage in union activity to procure a benefit.[20]

First, employees who do not hold union office are not disadvantaged due to the MOA's application. There is no restriction on the number of employees in each rating group so no employees are displaced by the change in rating of Executive Board members. As a result, employees who do not hold union office remain in the same situation, and will receive the same rating and annual salary increase, regardless of the Executive Board members' ratings.[21]

Second, the MOA does not place union officials in a preferred position unattainable by unit employees without resort to Association service. Rather than providing an unearned perk, the MOA provides simply that Executive Board members receive no lower than the EPR rating they earned in the appraisal period immediately preceding their Association service. Unlike the additional 45 cents per hour given to union stewards in R. L. Lipton or the

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[20] Compare Dairylea, 219 NLRB at 658 (clause at issue clearly encouraged employees to seek appointment to union office because they gained a benefit, increased seniority, which they could not have possessed had they not done so).

[21] See WPIX, 288 NLRB at 376; Consumers Energy Co., 325 NLRB at 965 (noting that employees who do not take full-time union positions are not disadvantaged by a pension plan amendment negotiated to close the gap between the retirement earnings potential of union officers and employees who had not held union office).

guaranteed highest seniority given union stewards in Dairylea, here the EPR ratings given to union officers — or a higher rating — are attainable by all unit employees without resort to union activity. There is no special category set aside for union officials, and they are not guaranteed to receive the highest percentage raise or the highest ranking in their work group.[22] Thus, the MOA simply ensures that the union representatives' union activities do not adversely affect the EPR ratings they might reasonably expect base on the level that they previously achieved.

Third, the MOA provision "merely removes...a condition that would discourage employees from taking temporary union jobs."[23] Thus, the MOA was negotiated in response to concerns that Executive Board members were suffering adverse employment consequences due to their union activity when an Executive Board member's performance rating dropped after serving as grievance chairperson. Further, under the current collective-bargaining agreement, an arbitrator may not direct the Employer to change an employee's rating; rather, it may only direct the Employer to reconsider its review. Thus, the parties' grievance/arbitration procedure does not protect employees from potential adverse consequences as a result of their union activity.

Fourth, there is no evidence to suggest that the protection afforded by the MOA has had the effect of encouraging union activity. In practice, it has not turned Executive Board membership into a sought-after position, as indicated by the fact that elections for these positions have always been uncontested.

Thus, since we conclude that the MOA does not encourage union activity or status, we need not reach the

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[22] Moreover, although the MOA prevents Executive Board members from receiving lower raises during their Association service, they are still numerically ranked along with their peers. Accordingly, their performance is still judged and ranked in descending order of merit relative to other employees in their work group.

[23] WPIX, 288 NLRB at 376. See also Consumers Energy Co., 325 NLRB at 965.

third step in the analysis, i.e., whether the disparate treatment is justified by the policies of the Act.[24]

Accordingly, the charges should be dismissed, absent withdrawal.

/s/
B.J.K.

[24] See WPIX, 288 NLRB at 376.